

RECEIVED**APR 30 2001****FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Common Carrier Bureau Seeks Comment)	
On Letters Filed By Verizon And Birch)	DA 01-722
Regarding Most-Favored Nation Condition In)	
SBC/Ameritech And Bell Atlantic/GTE Orders)	
Ameritech Corp., Transferor, and)	CC Docket No. 98-141
SBC Communications, Inc., Transferee)	
GTE Corporation, Transferor, and)	CC Docket No. 98-184
Bell Atlantic Corporation, Transferee)	

COMMENTS OF BIRCH TELECOM, INC.

Birch Telecom, Inc. ("Birch") and hereby files its comments in response to the Public Notice issued by the Federal Communications Commission ("FCC") on March 30, 2001 regarding the interpretation of Section XII, Paragraph 43 of the FCC-approved SBC/Ameritech Merger Conditions. Birch also comments on whether the FCC should grant SBC a waiver or modification of the relevant "most favored nation" ("MFN") provision.

Letters from two Competitive Local Exchange Carriers ("CLECs"), including Birch, prompted the Public Notice issued by the FCC in this matter. Birch sought to port a Reciprocal Compensation attachment into its existing and/or future interconnection agreements negotiated between Birch and SBC Communications Inc.'s affiliate, Southwestern Bell Telephone Company ("SWBT"), in Texas, Kansas, Missouri and Oklahoma. (Attachment A). The Reciprocal Compensation attachment in question was previously negotiated between Sage Communications, Inc. and SWBT in Texas, and ultimately approved by the Texas Public Utility Commission on February 2, 2000 ("Sage

Attachment”). (Attachment B). In its letter to SWBT to elect the Oklahoma 271 Agreement (“O2A”), Birch notified SWBT of its intention to incorporate additional amendments to the O2A. (Attachment C).

On February 19, 2001, SBC/Ameritech issued a letter to Birch indicating that SWBT was not “amenable to voluntarily adding the Sage Compensation Appendix from Texas to Birch’s Oklahoma Agreement” (“SBC/Ameritech letter”) (Attachment D). Additionally, this letter also indicates SBC/Ameritech’s position that the Sage Attachment was not available for porting under the Merger Conditions as reciprocal compensation provisions are not UNEs, interconnection or service arrangements available for adoption under Section 252(i) of the Federal Telecommunications Act. The SBC/Ameritech letter further explains that the compensation terms Birch is seeking through the Sage Attachment are arbitrated terms and therefore precluded from being ported. Finally, the letter indicates that the terms of the Sage Attachment were awarded to a CLEC that operates exclusively through UNEs, and therefore SWBT is unwilling to port the same terms to Birch.

Section XII, paragraph 43 of the FCC SBC/Ameritech Merger Conditions provides:

Subject to the conditions specified in this Paragraph, SBC/Ameritech shall make available to any requesting telecommunications carrier in the SBC/Ameritech Service Area within any SBC/Ameritech State any interconnection arrangement or UNE in the SBC/Ameritech Service Area within any other SBC/Ameritech State that (1) was negotiated with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), by an SBC/Ameritech incumbent LEC that at all times during the interconnection agreement negotiations was an affiliate of SBC and (2) has been made available under an agreement to which SBC/Ameritech is a party.¹

¹ Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and

Based on the referenced provision, Birch believes that the reasoning provided by SWBT in the SBC/Ameritech letter is erroneous, illogical and completely contrary to the intent of the MFN Merger Condition. In support thereof, Birch refers the Commission to the explanation used by Common Carrier Bureau Deputy Chief Carol Matthey in her letter responding to Focal Communications, regarding an identical issue.

Finally, I note that Verizon's view is not consistent with the underlying purpose of the MFN provisions to facilitate the deployment of competition and to spread the use of best practices. The intent of the *Merger Condition* would be thwarted if a CLEC was forced to negotiate separately an interconnection agreement to obtain provisions relating to section 251(b) duties. (Attachment E).

It is no secret to the FCC, the United States Congress or investors on Wall Street that CLECs are forced into bankruptcy on a daily basis in this country. Birch asserts to this Commission that part of the reason for the CLEC demise is that certain Incumbent Local Exchange Carriers such as SBC/Ameritech, are not meeting its obligations and commitments under the Federal Act and/or FCC Orders. SBC/Ameritech boasted its commitment to its "National-Local" Strategy to this Commission as a positive, competitive effect of the SBC/Ameritech Merger. However, over the past two months, SBC/Ameritech has either scaled back its out of region competitive efforts, or pulled out of markets as a CLEC altogether. It seems that SBC/Ameritech would rather seek waivers or modifications of Merger Conditions than to implement the commitments it has previously made to this Commission and to consumers. Birch emphatically opposes a

310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, Appendix C, (1999) ("*SBC/Ameritech Merger Order*").

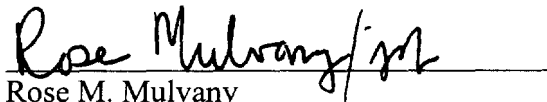
waiver or modification by SBC/Ameritech of its MFN obligations under the Merger Conditions.

At a point in time in the competitive telecommunications industry when CLEC resources are increasingly scarce, SBC/Ameritech has forced Birch and other CLECs into utilizing its resources to compel SBC/Ameritech's compliance with Merger Conditions to which it fully agreed to obtain regulatory approval of its merger. Birch does not believe the FCC intended for CLECs to expend resource after resource negotiating and re-negotiating terms of an interconnection agreement, particularly when the terms a CLEC desires have been previously negotiated by an SBC/Ameritech affiliate with another CLEC within the SBC/Ameritech region. In fact, such a requirement would be contrary to the over-arching goals of MFN provisions.

Birch has proven to be a valiant competitor to SBC in its five-state SWBT territory. Birch seeks regulatory action only as a last resort to reaching an impasse over the conference room table. In this case, Birch believes its interpretation of the MFN Merger Condition is consistent with the interpretation reached previously by the Common Carrier Bureau itself. Birch believes it burdensome and inefficient for both the FCC and CLECs to expend resources to resolve the issue at hand. Rather, the interpretation is clear; SBC/Ameritech's response to Birch is anti-competitive and is further evidence of how SBC/Ameritech uses the regulatory process to delay the deployment of true telecommunications competition in this country.

WHEREFORE, Birch Telecom, Inc. respectfully submits the foregoing comments and asks the Commission to take the same into consideration when determining the issues presented herein.

Respectfully submitted,

A handwritten signature in black ink, reading "Rose Mulvany" followed by a stylized flourish or initials.

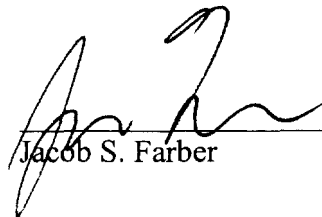
Rose M. Mulvany
BIRCH TELECOM, INC.
2020 Baltimore Avenue
Kansas City, MO 64108
(816) 300-3731 (voice)
(816) 300-3350 (fax)
rmulvany@birch.com

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2001, copies of the foregoing Comments Of Birch Telecom, Inc. were sent by first-class mail, postage prepaid, to the following parties:

Mark Stone
Accounting Safeguards Division
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W., Room 6-C365
Washington, D.C. 20554

Debbi Byrd
Accounting Safeguards Division
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W.
Room 6-C316
Washington, D.C. 20554



Jacob S. Farber



Attachment A

February 19, 2001

Kathy Karavidas
SBC Communications, Inc.
350 N Orleans, Fl 3
Chicago, IL 60654

Re: Election of Attachment 12 from the Sage Telecom, Inc./SWBT Texas
Interconnection Agreement.

Dear Kathy:

Pursuant to the FCC Merger Conditions adopted on October 6, 1999, and incorporated by reference in our interconnection agreements in Texas, Missouri, Kansas and Oklahoma (collectively referred to herein as "Interconnection Agreements"), Birch requests amendments to our Interconnection Agreements to incorporate the Attachment 12 from the Sage Telecom, Inc./SWBT Texas interconnection agreement.

Section XII, paragraph 43 of the FCC Merger Conditions provides:

Subject to the conditions specified in this Paragraph, SBC/Ameritech shall make available to any requesting telecommunications carrier in the SBC/Ameritech Service Area within any SBC/Ameritech State any interconnection arrangement or UNE in the SBC/Ameritech Service Area within any other SBC/Ameritech State that (1) was negotiated with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), by an SBC/Ameritech incumbent LEC that at all times during the interconnection agreement negotiations was an affiliate of SBC and (2) has been made available under an agreement to which SBC/Ameritech is a party.

Therefore, as a negotiated interconnection arrangement in Texas, the Sage Attachment 12 must be made available in Texas, Missouri, Kansas and Oklahoma. Please provide me with three (3) executed signature pages for each of the Amendments so that Birch can execute and file these Amendments in a timely fashion.

Thank you for your attention to this matter.

Sincerely yours,

John Ivanuska
Vice President, Interconnection
& Carrier Relations

cc: Mary Pat Regan - SBC
Tony Jackson - SBC
Patti Kettler
John Chuang
Rina Hartline
✓ Rose Mulvany



January 26, 2001

Marianne Kline
Southwestern Bell Telephone Company
Contract Administration
311 S. Akard
4 Bell Plaza, 9th Floor
Dallas, TX 75202

Re: Election of Oklahoma Interconnection Agreement

Dear Ms. Kline:

Enclosed please find the executed signature page of the Interconnection Agreement between Southwestern Bell Telephone Company and Birch of Oklahoma, Inc. This agreement will supercede our current Interconnection Agreement in Oklahoma.

Additionally, as discussed with Lisa Dabkowski, Birch reminds you that once the executed Agreement has been filed with the Oklahoma Commission for approval, Birch will amend the O2A as follows:

1. Amend Attachment 12: Compensation to substitute the Attachment 12 from the Sage Telecom, Inc./SWBT Texas Interconnection Agreement; and
2. Amend Attachment 25: xDSL to include the acceptance testing language that is available today in our current Interconnection Agreement.

Thank you for your attention to this matter. Please call if you have any questions or concerns.

Sincerely yours,

John Ivamiska
Vice President, Interconnection
& Carrier Relations

cc: Patti Kettler
Rina Hartline

John Chuang
Lisa Dabkowski - SBC

THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY
BE ENFORCED BY THE PARTIES.

Signature: Gregory C. Lawton

Print Name: Gregory C. Lawton

Title: Senior Vice President

Date: January 25, 2001

Birch Telecom of Oklahoma, Inc.
OCN/AECN: 3642

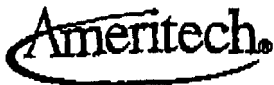
Signature: Willena Slocum

Print Name: Willena Slocum

Title: For/President-Industry Markets

Date: 12-1-00

Southwestern Bell Telephone Company



February 19, 2001

John Ivanuska
2020 Baltimore
Kansas City, MO 64108 . .

Dear Mr. Ivanuska:

Re: Birch adoption of the O2A and Request for Amendments

I am in receipt of your letter of January 26, 2001 to Marianne Kline transmitting the signature pages for the O2A and advising Southwestern Bell of Birch's intent to amend the O2A, once approved. The proposed amendments would be to add Attachment 12 - Compensation from the Sage Telecom, Inc./Southwestern Bell Texas Interconnection Agreement and to add the acceptance testing language in the current Birch Oklahoma agreement to Attachment 25 - xDSL.

Although your letter explains that the proposed amendments were previously discussed with Lisa Dabkowski, I have spoken with her and she has assured me that Southwestern Bell never agreed to port and/or add the Sage Compensation Appendix from Texas to the Birch Oklahoma agreement.

Southwestern Bell is not amenable to voluntarily adding the Sage Compensation Appendix from Texas to Birch's Oklahoma Agreement. In addition, such Appendix is not available for porting under Paragraph 43 of the SBC/Ameritech Merger Conditions because reciprocal compensation provisions are not UNEs, interconnection or service arrangements available for adoption under Section 252(i) of the Act. Moreover, the compensation terms Birch is seeking are arbitrated terms, which also disqualifies such terms for porting under that same paragraph of the merger conditions.

The Birch O2A already allows for bill and keep. The terms of the Sage arbitration award, which was awarded to a CLEC operating exclusively via UNEs, includes unacceptable terms related to the exchange of records. Although, Southwestern Bell is willing to continue to discuss various bill and keep arrangements with Birch (and in fact such discussions have been occurring for a period of months), Southwestern Bell is unwilling to accept an arrangement which did not include an obligation to exchange records.

Concerning the request to amend the O2A to add the acceptance testing language in the current Birch Oklahoma agreement to Attachment 25 - xDSL, the amendment has been requested from Contract Administration and will be forwarded to Birch once complete.

In line with our discussion of amendments to the O2A, let me bring you up to speed on the status of the Commitment Letter amendments. Those amendments will be ready shortly after the Commitment Letter signatures have been obtained. We will be transmitting those amendments to Birch for review shortly. Please call me with any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathy Karavidas".

Kathy Karavidas
SBC/Ameritech Lead Negotiator

John Chuang
Lisa Dabkowski
Eric Larsen
Marianne Kline

Federal Communications Commission

DA 00-2890

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

December 22, 2000

Mr. Michael L. Shor
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007-5116

RE: *Bell Atlantic/GTE Merger Order*, CC Docket No. 98-184, ASD File No. 00-30

Dear Mr. Shor:

This letter addresses your November 9, 2000 letter on behalf of Focal Communications Corporation ("Focal") concerning the most-favored nation ("MFN") provisions of the *Bell Atlantic/GTE Merger Order*.¹ As explained more fully below, the *Bell Atlantic/GTE Merger Order*'s MFN provisions apply to entire interconnection agreements, so that carriers may import interconnection agreements from one state into another state.

On November 9, 2000, Focal submitted a letter to the Common Carrier Bureau ("Bureau") requesting an interpretation regarding the proper application of the MFN provisions contained in the *Merger Conditions*.² In its letter, Focal contends that Verizon Communications, Inc. ("Verizon") incorrectly interprets the MFN provisions by excluding provisions of interconnection agreements related to reciprocal compensation and certain other subjects. Focal further asserts that this interpretation issue has delayed its entry into at least four states in the Verizon service area.³ In its December 6, 2000 response to Focal's letter, Verizon argues that this *Merger Condition* is limited only to interconnection arrangements and unbundled network elements ("UNEs") subject to section 251(e) of the Communications Act of 1934, as amended ("the Act").⁴ Verizon asserts that the language of the MFN provisions excludes certain provisions of interconnection agreements, such as provisions addressing

¹ Letter from Michael L. Shor, Swidler Berlin Shereff Friedman, LLP, to Carol E. Matney, Deputy Chief, Common Carrier Bureau, FCC (Nov. 9, 2000) ("*Focal November 9, 2000 Letter*"); see GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, FCC 00-221 (rel. Jun. 16, 2000) ("*Bell Atlantic/GTE Merger Order*"). The *Merger Conditions* are contained in Appendix D.

² *Bell Atlantic/GTE Merger Order* at Appendix D, para. 32; see *id.* at paras. 300-05 (describing MFN provisions).

³ *Focal November 9, 2000 Letter* at 6-7.

⁴ Letter from Patricia E. Koch, Assistant Vice President, Verizon Communications, Inc., to Carol E. Matney, Deputy Chief, Common Carrier Bureau, FCC at 2 (Dec. 6, 2000) ("*Verizon December 6, 2000 Letter*"); see *Focal November 9, 2000 Letter* at Attach. 2, 2-3 (submitting Verizon correspondence that asserts that reciprocal compensation, number portability, and certain other subjects fall outside the scope of the MFN provisions).

reciprocal compensation and rights-of-way, from the MFN provisions of the *Bell Atlantic/GTE Merger Order*.⁵

In the *Bell Atlantic/GTE Merger Order*, the Commission adopted the MFN provisions to mitigate certain harms arising out of the merger. In particular, the Commission found that the MFN provisions address the harms of the merger by facilitating market entry and spreading the use of best practices throughout Verizon's region.⁶ Pursuant to the *Merger Conditions*, Verizon must allow requesting telecommunications carriers in one state to opt-in to any interconnection arrangement or unbundled network element contained in an interconnection agreement from another state.⁷

The *Merger Conditions* allow competitive local exchange carriers ("CLECs") to import entire interconnection agreements across state lines. Specifically, the *Merger Conditions* allow CLECs to opt-in to any "interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement)."⁸ The plain language of the *Merger Conditions* permit a CLEC to obtain an entire interconnection agreement under the MFN provisions, so long as the agreement was voluntarily negotiated and meets the timing and location requirements specified in the conditions. Focal thus correctly points out that, in the *Bell Atlantic/GTE Merger Order*, the Commission articulated its understanding of the term "interconnection arrangement" to encompass "entire interconnection agreements or selected provisions from them."⁹

Verizon is incorrect in asserting that the reference to section 251(c) limits a CLEC's opt-in rights under the MFN provisions of the *Merger Conditions*. Specifically, Verizon asserts that subjects addressed by section 251(b), e.g., reciprocal compensation, number portability, and access to rights-of-way, fall outside the scope of the *Merger Conditions* because of the express reference to section 251(c) in the MFN provisions.¹⁰ Section 251(b) is incorporated explicitly into section 251(c) at the outset of that subsection, however, and further in the subsection establishing a duty for incumbent LECs to negotiate

⁵ *Verizon* December 6, 2000 Letter at 2.

⁶ *Bell Atlantic/GTE Merger Order* at paras. 300-05, 352 (stating that the MFN provisions reduce a CLEC's risk and cost of entry), 356 (stating that the MFN provisions will spread the use of best practices), 370 (noting that the MFN provisions will lower entry barriers for CLECs).

⁷ *Id.* at Appendix D, para. 32; see *id.* at paras. 300-01, 305.

⁸ See *id.* at Appendix D, para. 32.

⁹ *Id.* at para. 300, n. 686; see *Focal* November 9, 2000 Letter at 2.

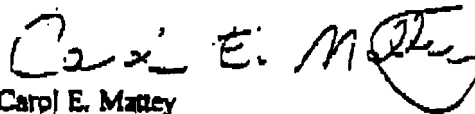
¹⁰ See *Verizon* December 6, 2000 Letter at 2; see also *Focal* November 9, 2000 Letter at Attach. 2, 2 (submitting correspondence from Verizon to Focal). In each of the MFN provisions, the *Merger Conditions* refer to "any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of those Conditions that was voluntarily negotiated . . ." See *Bell Atlantic/GTE Merger Order* at Appendix D, paras. 30, 31(a), and 32.

agreements in good faith.¹¹ The phrase "interconnection agreement (including an entire agreement) subject to section 251(c)" in the *Merger Condition* merely refers to the type of agreement that is subject to this provision, namely, an interconnection agreement addressing the duties set forth in subsections 251(b) and 251(c). Moreover, the *Merger Conditions* expressly state that the rules and requirements of section 252(f) apply to all requests for interconnection arrangements and UNEs under the MFN provisions of the *Merger Conditions*. The MFN provisions expand the section 252(f) opt-in rights of CLECs by allowing CLECs to import interconnection arrangements (including entire agreements) from one state into another state, thereby reducing the time and expense of negotiating interconnection agreements. Finally, I note that Verizon's view is not consistent with the underlying purpose of the MFN provisions to facilitate the deployment of competition and to spread the use of best practices. The intent of the *Merger Condition* would be thwarted if a CLEC was forced to negotiate separately an interconnection agreement to obtain provisions relating to section 251(b) duties.

As a final matter, Verizon contends that Focal may not avail itself of certain provisions of interconnection agreements because of Commission precedent, the expiration of the original interconnection agreement, or state regulatory requirements.¹² The MFN provisions contemplate the possibility that Verizon and a requesting CLEC may not completely agree about the availability of certain interconnection arrangements or provisions within an interconnection agreement. Specifically, the *Merger Conditions* provide that "[d]isputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable."¹³ To the extent Verizon believes that a requested interconnection arrangement is ineligible under the MFN provisions because, for example, the arrangement may be technically infeasible, the proper course of action is for Verizon to allow the CLEC to opt-in to the entire agreement other than the contested terms. Verizon may then raise its views regarding the contested provision before the state commission instead of unilaterally limiting a CLEC's options under the MFN provisions.

If you have any questions concerning this matter, you may contact me or Anthony Dale in the Common Carrier Bureau at (202) 418-2260.

Sincerely,



Carol E. Matney
Deputy Chief, Common Carrier Bureau

¹¹ *Focal November 9, 2000 Letter* at 3; see 47 U.S.C. § 251(c)(1) (establishing an incumbent LEC's duty to negotiate in good faith the terms and conditions of agreements to fulfill the duties described in sections 251(b) and (c)).

¹² *Verizon December 6, 2000 Letter* at 2-4.

¹³ *Bell Atlantic/GTE Merger Order* at Appendix D, paras. 30, 31(a), 32.